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No. 08-1528

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICK J. SIKORSKI,

Petitioner,

v.

OKEMO MOUNTAIN, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit's *Summary Order* affirming a judgment for the Respondents notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b), was consistent with Petitioner's right to trial by jury.

RULE 29.6 STATEMENT

Okemo Mountain, Inc., now known as Okemo Limited Liability Company, is wholly owned by Triple Peaks, Inc., a sub-chapter S corporation owned exclusively by Timothy and Diane Mueller and their two adult children.

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OPINIONS BELOW

The 2009 opinion of the court of appeals denying Sikorski's petition for panel rehearing or, in the alternative, for rehearing *en banc* (Pet. Appx. 47a - 48a) is not reported.

The 2008 opinion of the court of appeals (Pet. Appx. 40a - 46a) affirming the district court's judgment for Okemo notwithstanding the verdict and ruling on a variety of other post-trial motions is not reported in F.3d but is reported at 303 Fed. Appx. 938 and 2008 WL 5273494.

The 2006 opinion of the district court granting judgment for Okemo notwithstanding the verdict and ruling on a variety of other post-trial motions (Pet. Appx. 20a - 39a) is not reported in the F. Supp. 2d but is reported at 2006 WL 3333100.

The 2004 decision of the court of appeals denying Sikorski's petition for panel rehearing or, in the alternative, for rehearing *en banc*, does not appear in the *Petitioner's Appendix* and is not reported.

The 2004 opinion of the court of appeals (Pet. Appx. 2a -19a) reversing and remanding the district court's grant of summary judgment to Okemo is reported at 376 F.3d 102.

The 2003 opinion of the district court granting summary judgment for Okemo on its motion to renew the 1995 judgment does not appear in the *Petitioner's Appendix* and is not reported.

The 1995 decision of the district court granting judgment for Okemo against Sikorski following a trial by court does not appear in the *Petitioner's Appendix* and is not reported.

COUNTERSTATEMENT

In 1993, Okemo Mountain, Inc. sued Patrick Sikorski and U.S. Sporting Clays in the District of Vermont asserting that Sikorski, while acting sometimes as an agent of U.S. Sporting Clays and, at other times individually, had defrauded Okemo when he induced the ski resort to sponsor a sporting event.

In 1995, shortly before trial, Okemo settled with U.S. Sporting Clays. Following trial by court, Okemo obtained a fraud judgment against Sikorski, solely for acts done by him in his individual capacity, and not for acts done when Sikorski was acting as an agent for U.S. Sporting Clays.

Sikorski appealed the judgment and then, while his appeal was pending, filed for bankruptcy, thus staying his appeal. Okemo successfully objected to Sikorski's discharge in bankruptcy court. When, at the conclusion of the bankruptcy proceedings, Sikorski failed to perfect his appeal, the court of appeals dismissed it.

In 2003, because Okemo was unable to collect the amounts due to it by Sikorski under the judgment, Okemo asked the district court to renew the judgment. But for this request, the judgment would have expired under both state and federal law. 28 U.S.C. § 1962; Vt. Stat. Ann. tit. 12, § 506 (2002). In response, Sikorski

requested equitable relief from the district court under Federal Rule of Civil Procedure 60(b), asserting that Okemo's pre-trial release of U.S. Sporting Clays barred the claims which had resulted in the judgment against him. When the district court ruled that the release did not bar the 1995 judgment, Sikorski appealed to the Second Circuit.

Although they disagreed over the meaning of the document, both Okemo and Sikorski argued that the release was unambiguous. But, the court of appeals disagreed, found that the document was ambiguous and remanded the case to the district court stating: "a trial is warranted to determine what was contemplated by the parties at the time the release was executed." *Okemo Mountain, Inc. v. U.S. Sporting Clays Association*, 376 F.3d 102, 104 (2d Cir. 2004).

A motion by Sikorski for re-argument and a hearing *en banc* was denied by the court of appeals.

On remand, Sikorski expanded his case by adding an independent action in equity and tort claims against Okemo and its owner, Timothy Mueller.

Following a trial before what was both an advisory and a common law jury (depending upon which claim or cross-claim was being considered) the jury rendered an advisory verdict for Sikorski on his equitable claims and a common law verdict for him in the amount of $650,000 on his tort claims.[1]

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1. Pet. Appx., 52a - 54a.

Following post-trial motions, the district court ruled that:

> (1) there was no evidence which supported Sikorski's claim that Okemo had intended to release him in his individual capacity;
>
> (2) there was enough evidence to support Sikorski's claim that Okemo's efforts to enforce the 1995 judgment constituted intentional infliction of emotional distress; and
>
> (3) the verdict was excessive and granted a new trial to Okemo unless Sikorski remitted that portion of the award exceeding $250,000.

In addition, the district court:

> (4) refused to renew Okemo's 1995 judgment against Sikorski, and
>
> (5) vacated the 1995 judgment.[2]

After Sikorski accepted the remittitur, both parties appealed to the Second Circuit.

On December 19, 2008, the court of appeals issued a *Summary Order* in which it:

> (1) affirmed the district court's ruling that there was no evidence to support Sikorski's claim that Okemo's release of U.S. Sporting

2. Pet. Appx., 20a - 39a.

Clays had released Sikorski for acts done while acting in his individual capacity;[3]

(2) reversed the district court's ruling denying Okemo's motion for judgment notwithstanding the verdict on Sikorski's IIED claim;[4]

(3) reversed the district court's decision to vacate the 1995 judgment against Sikorski; and,

(4) dismissed Okemo's appeal of the district court's failure to renew the 1995 judgment as moot.[5]

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3. "We agree with the district court that Okemo satisfied . . . [Fed. R. Civ. P. 50(b)'s] weighty burden with respect to its motion for judgment as a matter of law that the release did not cover the fraudulent inducement action brought against Sikorski in his individual capacity." *Okemo Mountain, Inc. v. Sikorski*, 303 Fed. Appx. 938, 940 (2d Cir. 2008). (Pet. Appx., 40a, 43a.)

4. "[W]e disagree with the district court and conclude that Okemo was entitled to judgment as a matter of law with respect to Sikorski's IIED claim." *Okemo Mountain, Inc. v. Sikorski*, 303 Fed. Appx. 938, 941 (2d Cir. 2008). (Pet. Appx., 40a, 44a - 45a.)

5. [A]t oral argument, counsel for Okemo agreed that if the 1995 judgment were not vacated and this Court found in Okemo's favor on the IIED claim, Okemo would no longer seek to renew its 1995 judgment against Sikorski. Because we have concluded that the 1995 judgment should not have been vacated and that Okemo was entitled to judgment as a matter of law on the IIED claim, we therefore dismiss Okemo's challenge to the district court's refusal to renew the 1995 judgment.

Okemo Mountain, Inc. v. Sikorski, 303 Fed. Appx. 938, 941 (2d Cir. 2008). (Pet. Appx., 40a, 45a - 46a.)

Once again, motions by Sikorski for reconsideration and for re-argument *en banc* were denied by the court of appeals.

REASONS FOR DENYING THE PETITION

I. THE CONSTITUTIONALITY OF RULE 50 IS THROUGHLY SETTLED.

The constitutionality of Rule 50 is thoroughly settled.

In *Galloway v. U.S.*, 319 U.S. 372 (1943), this Court held that the directed verdict does not violate the Seventh Amendment and stated:

> If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.
>
> . . .
>
> Furthermore, the argument from history is not convincing. It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for

> irrelevancy and relevant proof for other reasons.

Galloway, 319 U.S. at 389-90.

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) this Court held that retrial limited to the question of damages does not violate the Seventh Amendment, even though there was no practice at common law for setting aside a verdict in part.

In *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) this Court stated that "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment."

As the Fourth Circuit stated in *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793, 798-99 (4th Cir. 1959):

> [I]t is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. . . . [N]o constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. . . . [E]mployment [of judgment n.o.v.] within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury.

Finally, as the Fifth Circuit has noted:

> A directed verdict is a device to save time and trouble involved in lengthy jury determination. It is something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law-compassion and prejudice.

Rutherford v. Illinois Cent. R.R. Co., 278 F.2d 310, 312 (5th Cir. 1960) (*per curiam*) *cert. denied*, 364 U.S. 922.

II. THE "QUESTION . . . PUT TO THE JURY" IS IRRELEVANT WHEN A COURT CONSIDERS A POST-TRIAL MOTION UNDER RULE 50(b).

The Petitioner asserts that "entering judgment under Rule 50 based on a lack of evidence to support a question never put to the jury deprived Mr. Sikorski, and would deprive any litigant, of his constitutional rights to jury trial and to procedural and substantive due process of law . . . ."[6]

The Petitioner fails to appreciate the roles of judge and jury, and what a court does, and does not do, under Rule 50(b). The "question . . . put to the jury" is irrelevant when a court considers a post-trial motion under Rule 50(b). When considering a motion under Rule 50(b) a court does not, as the Petitioner asserts, evaluate "the sufficiency of evidence supporting *a question . . . put to the jury*." [Emphasis added.][7] On

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6. Petition, 7.

7. Petition, 7.

the contrary, when considering a motion for judgment notwithstanding the verdict under Rule 50(b), the court considers whether there was sufficient evidence to raise any question of fact to be presented to the jury. Whether there was sufficient evidence to have a fact determined by a jury is a question of law that can only be decided by a court. The legal, not factual, question is whether there was "a legally sufficient evidentiary basis to find for the party on that *issue*." Fed. R. Civ. P. 50(a)(1). [Emphasis added.] The question before the court when considering a motion for judgment notwithstanding the verdict is not whether the jury entered a correct verdict, the question is whether the case should have been submitted to the jury. "The question is . . .whether there is evidence upon which the jury might reasonably find a verdict for . . . [the non-moving] party." 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2524 (3d ed. 2008).

> Simply stated, . . . [the question] is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.

Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970).

It is also important to remember that many cases hold that because the directed verdict existed at common law at the time the Seventh Amendment was adopted, a court can, consistent with that Amendment, reserve ruling on a motion for a directed verdict and grant judgment as a matter of law for a party after a

verdict has been rendered. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). The mere fact that a court reserves a ruling on a motion for judgment as a matter of law does not change the question before the court. In either setting, the question is the same: whether the party with the burden of proof presented sufficient evidence such that a jury should determine facts. 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2524 (3d ed. 2008)(and cases cited).

The matter before both the district court and the court of appeals in this case was whether the evidence presented at trial by Sikorski on the release was sufficient to create an issue of fact for the jury. Both courts answered the question in the negative, and both courts determined that the law required that they enter judgment for Okemo. Neither the district court nor the court of appeals considered whether the jury was correct in deciding the question presented to it, or what question should have been presented to the jury. On the contrary, the district court and the court of appeals both concluded that no question, however framed, should have been presented to the jury regarding the intent of the parties to the release.

III. THE CASE INVOLVES NOTHING MORE THAN A DETERMINATION OF THE INTENT OF THE PARTIES TO AN AMBIGUOUS DOCUMENT.

Although from a procedural perspective the case below was "byzantine," "tortured and tangled,"[8] substantively, it was nothing more than an everyday dispute over the intent of the parties to an ambiguous document.

Both parties agreed that the document, labeled a "general release,"[9] was part of a series of documents designed to resolve a controversy between Okemo and U.S. Sporting Clays Association. And, both parties agreed that the instrument barred claims by Okemo against Sikorski for acts done by him as U.S. Sporting Clays' agent. However, Sikorski asserted, and Okemo denied, that the document barred all, not merely some, of Okemo's claims against him, and sought equitable relief under Federal Rule of Civil Procedure 60(b).

When the case first came before the court of appeals, the legal question was whether the controversy could be resolved by an examination of the "four corners" of the document, or whether parol evidence should be considered. Ironically, although Okemo and Sikorski (as well as the district court) concluded that the document was unambiguous, the court of appeals disagreed and

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8. Pet. Appx., 20a, 37a.

9. Pet. Appx., 49a - 51a.

ruled that the document was ambiguous.[10] The sole reason for the remand to the district court was to determine, through an examination of the document and parol evidence, whether Okemo and U.S. Sporting Clays intended to release Sikorski only when he acted as an agent or, alternatively, as Sikorski claimed, whether they intended to release him when he acted as an agent as well as when he acted on his own behalf.

After the presentation of the parol evidence, first the district court, and then the court of appeals, concluded, as a matter of law, that there was no evidence that warranted submitting any question to the jury regarding the intent of the parties to the ambiguous document.

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10. The court of appeals trenchantly noted that:

> Both parties in this litigation believe that the release instrument is textually unambiguous; yet each reads it as warranting summary judgment in its favor. When each side reasonably thinks a textual provision unambiguously favors its position, and those positions are diametrically opposed, we feel comfortable treating that disagreement as somewhat probative of ambiguity.

Pet. Appx., 6a.

IV. THIS CASE DOES NOT PRESENT A CONSTITUTIONAL QUESTION, MUCH LESS ONE THAT HAS HAD THE BENEFIT OF REVIEW AND ANALYSIS BY NUMEROUS COURTS.

Although it is clear that Supreme Court Rule 10 neither controls nor fully measures the Court's discretion when considering a petition for a writ of *certiorari*, Sikorski makes no effort to show that the decision of the court of appeals conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law or that it decided an important federal question in a way that conflicts with rulings of the Supreme Court.

On the contrary, Sikorski cites no case which either supports or rejects his view of Rule 50 and the Seventh Amendment. While, of course, this is strong evidence that the Petitioner's legal argument reflects a fundamental misunderstanding of the roles of judge and jury, if one assumes, solely for the purposes of discussion that there is any merit in the Petitioner's claim, it also means that the Court is being asked to consider a question without the benefit of argument and counter-argument as well as review and analysis by multiple parties in multiple courts in multiple cases. While no one claims that conflict within the circuits or between courts of appeal and state courts of last resort is a prerequisite to the granting of a petition for a writ of *certiorari*, no reasonable person would challenge the claim that the debates these conflicts create are of assistance to the Court.

V. DISILLUSIONMENT IS NOT GROUNDS FOR REVIEW BY THIS COURT.

The Court could not fulfill its role under our Constitution if it attempted to review appeals by every disgruntled litigant who sought review because his or her "faith in our system was shattered."[11] Similarly, the Court cannot grant petitions for writs of *certiorari* because of unsupported intimations of impropriety. Sikorski's reference to the *Code of Conduct for United States Judges* and his oblique statement that "anyone involved in or knowledgeable about such a case may believe the 'fix was in' for the prevailing party"[12] is beyond the pale.

The ruling by the court of appeals was an ordinary ruling in an ordinary case, which but for its longevity and procedural knots, was the type of case state and federal courts consider and resolve in the ordinary course of business. The assertion that the outcome of this case is so unusual that it "call[s] for an exercise of this Court's supervisory power"[13] is wholly without merit.

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11. Petition, 24.

12. Petition, 23 - 24.

13. Petition, 24.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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